

**United States Department of Labor
Employees' Compensation Appeals Board**

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 07-1841
Issued: March 11, 2008**

Appearances:

C.B. Weiser, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 9, 2007 with respect to an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$43,772.62 was created; (2) whether the Office properly found appellant at fault in creating the overpayment; and (3) whether the Office properly determined the overpayment should be recovered by deducting \$200.00 from her continuing compensation payments.

FACTUAL HISTORY

On March 27, 2000 appellant filed an occupational claim alleging that she sustained an emotional condition as a result of her work as a labor relations specialist. The Office accepted the claim for recurrent major depressive disorder and bipolar disorder. Appellant had been

receiving retirement benefits through the Office of Personnel Management (OPM). In August 2003, she elected to receive benefits under the Federal Employees' Compensation Act retroactive to March 10, 2001.

According to a letter dated September 25, 2003 from OPM, appellant had been paid \$104,210.70 from March 10, 2001 to September 1, 2003. The record indicates that the Office issued appellant a compensation payment dated October 17, 2003 for \$54,385.76. The payment was sent to appellant and stated that it represented compensation from March 10, 2001 to October 4, 2003. The record contains a copy of the reverse of the payment indicating that it was deposited on October 22, 2003, with an additional stamp "FRB Atlanta" dated October 24, 2003.

By letter dated October 28, 2003, the Office advised appellant that the payment had been made in error. The Office stated that she was actually entitled to only \$10,331.30 in compensation benefits. The letter also referenced an October 28, 2003 telephone call to appellant.

In a letter dated July 19, 2006, the Office advised appellant of a preliminary determination that an overpayment of \$43,772.62 was created. The Office stated that she was entitled to \$10,331.30, less health benefits and life insurance premiums totaling \$281.04. According to the Office, appellant was also found to be at fault, as she was advised on October 28, 2003 by telephone conversation and letter that an overpayment existed. In a worksheet dated July 6, 2006, the Office calculated that appellant should have been paid \$114,542.00 in compensation for the period March 10, 2001 to October 4, 2003. The compensation rate was for a claimant with no dependents.

Appellant requested a hearing on the overpayment issues and submitted an overpayment recovery questionnaire (OWCP-20). A hearing was held on February 14, 2007. Appellant indicated that she had received a second payment of \$54,385.73 dated October 24, 2003, but had not deposited this payment. In addition, she argued that the compensation paid from March 10, 2001 did not reflect that she had a dependant daughter.

By decision dated April 9, 2007, the hearing representative finalized the preliminary determinations that an overpayment of \$43,772.62 was created and appellant was not entitled to waiver as she was at fault in creating the overpayment. The hearing representative determined that appellant had deposited the October 17, 2003 payment on October 24, 2003. According to the hearing representative, the record showed that appellant "was contacted via telephone on October 18, 2003 and advised of the overpayment." The hearing representative determined that appellant should repay the overpayment by deducting \$200.00 from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

A beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable.¹

¹ *Sharon Handy*, 57 ECAB ____ (Docket No. 06-51, issued February 17, 2006).

ANALYSIS -- ISSUE 1

The evidence establishes that an overpayment of compensation was created in this case. Appellant had been receiving OPM retirement benefits but, in August 2003, elected to receive FECA benefits as of March 10, 2001. OPM indicated that appellant received retirement benefits during the period March 10, 2001 to September 1, 2003 totaling \$104,210.70. The Office determined that, for the period March 10, 2001 to October 4, 2003, appellant should have received \$114,542.00, less \$281.84 in health benefit and life insurance premiums. She would be entitled to the difference between the amount she should have received in compensation benefits and the amount she received from OPM. Even though there appears to be errors in calculating the amount, as noted below, the evidence of record establishes the payment of \$54,385.73 exceeded the amount to which she was entitled and an overpayment was created.

With respect to the amount, the record requires further development. The Board notes that OPM stated that its payments stopped as of September 1, 2003. It is not entirely clear why the Office calculations use the date October 4, 2003, although this could represent the end of a compensation period cycle. The Board notes that the Office appeared to find that appellant was entitled to \$10,331.30 (the difference between \$114,542.00 and \$104,210.70) “less” the premiums of \$281.84. If appellant was entitled to only \$10,049.96, as found by the hearing representative, then the overpayment would be \$44,336.27 (the difference between \$54,385.73 and \$10,049.96). The Office apparently added the premiums of \$281.84, rather than subtracting.

In addition, appellant raised the issue of whether the Office properly calculated the amount of compensation owed during the overpayment period. The worksheets provided by the Office indicate the compensation rate was based on a claimant with no dependents. Appellant contended that she provided information to the Office showing she had a dependent and was entitled to the augmented rate.² The hearing representative did not properly address the issue, noting only that, while it appeared the Office did not use the augmented rate, “any underpayment due cannot be used to offset this overpayment.” No further explanation was provided. The amount of the overpayment is properly determined by calculating what appellant should have been paid in compensation during the overpayment period, subtracting the amount she received from OPM, and calculating the difference between this amount and the incorrect payment she received of \$54,385.73. If there was an error in determining how much compensation appellant should have received from March 10, 2001 to September 1, 2003, then the amount of the overpayment was improperly calculated.

On remand the Office should develop the issues regarding the amount of the overpayment. The Office should provide a clear explanation as to the period of the overpayment and the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act³ provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and

² See 5 U.S.C. § 8110.

³ 5 U.S.C. § 8129.

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁴ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁵

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

The finding of fault in this case was based on the third standard of accepting a payment appellant knew or should have known was incorrect. The record shows that the Office issued a \$54,385.76 payment dated October 17, 2003. The reverse of the payment indicated that it was deposited into appellant’s bank account on October 22, 2003.⁶ The acceptance of the payment occurs when the payment is deposited by the claimant.⁷ The issue then becomes whether appellant, as of October 22, 2003, knew or should have known the \$54,385.73 payment was incorrect. The preliminary determination of an overpayment stated that appellant should have known based on an October 28, 2003 telephone conversation and a letter of the same date advising her that the payment was incorrect. An October 28, 2003 telephone call or letter cannot establish fault when the payment is deposited on October 22, 2003. As the Board explained in *Michael R. Nixon*,⁸ the Office cannot establish fault with a telephone call or letter advising of an erroneous payment unless it occurred prior to the acceptance of the payment.

The hearing representative made a finding, without further explanation, that there was an October 18, 2003 telephone call regarding the October 17, 2003 payment. The hearing representative stated that appellant confirmed at the hearing that she received a telephone call from the Office on October 18, 2003. The record contains no evidence supporting this finding. Appellant indicated at the hearing that she received a telephone call on October 28, 2003. There is no memorandum of a telephone call dated October 18, 2003. The October 28, 2003 letter referred only to an October 28, 2003 telephone call. The Board finds no probative evidence that the Office advised appellant of an erroneous payment prior to acceptance of the payment.

There is no indication in the record that the Office provided any other information regarding entitlement to compensation prior to acceptance of the October 17, 2003 payment. The payment indicated that it represented compensation for the period March 10, 2001 to

⁴ 5 U.S.C. § 8129(b).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁶ The hearing representative found appellant deposited the payment on October 24, 2003, but this appeared to represent the date it was processed by the federal regional bank in Atlanta.

⁷ *See T.C.*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

⁸ 40 ECAB 398 (1988).

October 4, 2003. No information was provided on the payment itself that is sufficient to establish appellant should have known it was incorrect. Appellant was entitled to some compensation during the period in question, and without any information as to the amount she was entitled to prior to acceptance of the payment, there is no probative evidence sufficient to establish that appellant accepted a payment she knew or should have known was incorrect.

The Board accordingly finds that the evidence is not sufficient to support the denial of waiver on the grounds that appellant was at fault in creating the overpayment. The case will be remanded for proper consideration for the waiver issue. After such further development as the Office deems necessary, it should issue an appropriate decision. The Board will not consider the repayment issue at this time.

CONCLUSION

The evidence indicates that an overpayment of compensation occurred in this case, although further development is required as to the amount. With respect to fault, the record does not support the Office's finding that appellant was at fault, and therefore the case will be remanded for proper consideration of whether the overpayment should be waived.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2007 is affirmed as to fact of overpayment, set aside and remanded with respect to amount and waiver.

Issued: March 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board